

A N
ACCOUNT

At Large of the
RIGHT HONOURABLE
THE

Earl of Danby's
ARGUMENTS

At the COURT of
KING'S-BENCH
A T

WESTMINSTER,

Upon his Lordship's Motion for BAIL,

The 27th. day of May, *Term. Pasch.* 1682.

Together with the

JUDGES ANSWERS

AND THE

EARL'S REPLYES,

As they were then Truly taken.

L O N D O N,

Printed for Charles Mearue, 1682.

ACCOUNT

As laid of the

RIGHT HONOURABLE

Earl of Darnley

ARGUMENTS

IN THE COURT OF

KING'S-BENCH

WESTMINSTER

Upon the Lordship's Motion for Bail

The application of the Lordship's Counsel

Together with the

JUDGES ANSWERS

AND THE

EARL'S REPLYES

As they were then Truly taken

AND A D D M

Printed for George Alcock, 1682.

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ACCOUNT

At Large of the
Earl of Danby's
ARGUMENTS

At the Court of
KING'S-BENCH,
Upon his Lordship's Motion for BAIL,
The 27th. day of May, Term. Pasch. 1682, &c.

IMmediately after his Lordship was in Court, the return of the *Habeas Corpus* was read, and Mr. Sanders (of Council for his Lordship) did move the Court, That whereas in *Easter Term* 1581, the Court had dismiss'd his Lordship with a *Declaration* that they would take into their Consideration till the *Term* following, what answer they would make to what had then been said to them by his Lordship and his Council; he therefore moved, That they might now accordingly know the pleasure of the Court, and that they would be pleas'd to grant Bail to the Earl of Danby.

But before the said Mr. Sanders could well have pronounced the foregoing words, the Lord Chief Justice *Pemberton* did reprimand the said Mr. Sanders for having offer'd to impose upon the Court what had never been said by them, saying, that there was no such thing as their having said at any time that they would take the Earl of Danby's Case into farther consideration; for that they had told my Lord of Danby the last time, that it was not in their power to give him any

Relief at all, and that he therefore wonder'd, and must extremely blame Mr. *Sanders* for moving the Court again in a matter to which they had already given such a positive Answer, and could not but admire, that he should so misinform his Clyent, as to give him any such advice, which could only be to the giving both him and the Court an unnecessary trouble.

To all which Mr. *Sanders* replied, that he humbly begg'd his Lordship's pardon if he had mistaken him, for that truly he did understand that his Lordship had declared that he would take time to consider of my Lord of *Danby's* Case till the following Term; but that if it was a mistake, he must beg his Lordship's pardon, and did believe the rest of his Brethren took it so, as well as himself.

The Earl of *Danby* then spoke himself for about two hours, and said to the Lord Chief Justice, that he met with an Objection which he did not expect, and that he must beg his Lordship's pardon not to let that pass for a mistake which his Council had affirm'd, of the Courts having taken time to consider of his Case, till the next Term after that of his Lordship's being last there; for that his Lordship did therein appeal both to the rest of the Judges which were upon the Bench with him, and to all other persons whatsoever who were then in Court, whether his Lordship had not said that if he (meaning the Earl of *Danby*) pleased, they would take time to consider of his Case till the next Term; and he did declare upon his Honour that those words had been pronounced to him by my Lord Chief Justice himself, and that he did then accept it as a favour from the Court, and did return his humble thanks to them for it: In so much that his Lordship said, that he confessed he was very much surprized to meet with such an Introduction at the first entrance into a matter which he conceived to be of so great weight as he doubted not but he should make this Case of his appear to be.

But yet that it did give him reason to believe that he came with some prejudice before his Lordship, and that they were so much prepossessed in this matter, that if he did not think every Man in *England* would find that he might be concern'd in what resolution should be given in this Case, as well as himself, he should scarcely have ventured upon it, though he had lain so long under so unreasonable a Confinement as he took himself to do; and therefore he must desire their Lordships patience and attention to what he had to offer in his own behalf, and (as he believed) in the behalf of the *Liberty of the Subject* in general.

His Lordship directing himself to the Lord Chief Justice, said, It was just now a year since he was before his Lordship in this Court, and that he was assured, that his Lordship did then please to tell him that they would take time to the following Term to consider of what they should think fit to doe in his Lordship's Case; But he said, that care was then taken the first day of that following Term to prevent his coming there, by an *Indictment* which was brought against him (ready

cut and dry'd, as he had been told) for his being privy to the Murther of Sir *Edmund-Bury Godfrey*.

He said he did not wonder at it, Because there was nothing so *black*, which had not been Invented to be said against him, but he confessed he did wonder to hear, that such an Evidence of an *Irish Papist* (who was upon Tryal for his own Life, and upon an *hear-say* only) should be believed against an *English Protestant*, by a Jury of *English men*, and some of them *Gentlemen*; but yet that that wonder had been much abated, when he heard that the same *Foreman* had been as favourable in the Case of a *Notorious Murther*, as he had been ready to find that *Murther* against him, which had not the least *probability* in it, and which no man could think of with more Detestation both of the *Fact*, and of any *Man* that could have an hand in it, than himself.

However, this prevented him from coming there again till after notice had been given to Sir *Edmund-Bury Godfrey's* Brothers, to know if they had any thing further to say against him on that matter, and that he could get himself Discharg'd from that *Indictment*, and as to the wretch himself *Fitz Harris* (who had accused him) he did two days before his Death, send the *Minister* of the *Tower* to his Lordship, to beg of him, that before he died, his Lordship would forgive him his having sworn *falsly* against him; and he did confess, that he was put upon it to *save his own Life*, and did say by *whom* he was prompted to it; and whether it proceeded from those Men, who might think their Villanies discovered, and so might fear they could no way be safe but by putting that matter yet farther against him, or from what other Cause his Lordship could not tell, but (if his Lordship was not misinformed) he did hear that *some Men* were still endeavouring to get something more of the same nature to be sworn against him, if they can contrive how to make their forg'd Testimonies to agree about it.

He said he thought that time would have tired out the malice of such *Bloud-suckers* before now whom he had found so busie, for the first year and half after his Imprisonment, that he was not a Week without Endeavours used by strange People to get to speak with him, and such as he had reason oiten to suspect to be *Knights of the Post*; amongst whom the story of one *Magrath* (another *Irish Man*) he said, was notably remarkable in his endeavour (under pretence of kindness) to have made him their *Tool* to prove that Sir *Edmund-Bury Godfrey* had killed himself; but he said he had the good fortune immediately to detect that Villany, as he hoped yet to live to doe of *some* others; but that in the mean time he foresaw, that he was always to be a particular Object of the malice of such men, so long as he was left under this *Confinement*, from which he saw no hopes to be relieved but by that Court, where the Law Directs every *English* man to come for Justice, that is oppress'd in his Liberty.

He said he hoped his Lordship would forgive him for having been a little tedious on that Subject of Sir *Edmund-Bury Godfrey*, because
his

his Reputation had been so much Exposed in that particular, and before that Court.

After his discharge from that Indictment, he said there seemed to be a probability of the Call of a *Parliament* in some short time, and whenever he could give himself the least hopes of that, he resolved to trouble no other place; But that now he had not the least prospect of that kind, and that he had been a Prisoner above three years, and yet could safely swear, he was without the *knowledge* to that day, for what real Crimes he was Committed; only he knew that the name of *Treason* had been laid to his Charge, without saying wherein the *Treason* consisted.

He said he came therefore now to that *Court* (as the only proper place for all Persons to resort to for their *Liberty*) and he was sorry, that he was put to the great disadvantage of speaking in his own Cause, but because he saw the last time he was there, that some fault seemed to be found with his Councils, for urging things which seemed to relate to matters of *Parliament* (although upon a due consideration of his request there is nothing in it which does touch their Jurisdiction) he had chosen rather to rely upon the Courts pardoning his defects, than put any further hardships upon those Gentlemen who had been his Council, to whom he had been more beholden, than they had been to him; for that they had undergone some unheard-of rebukes already in another place, for offering to be of Council with him (though in matters of Law) which he believed had never been heard of but in his Case, and he hoped that (when all his Circumstances shall have been well considered) he shall be the last *English* man that will ever have so many hardships put upon him, as will appear to be through every part of his Case.

In the first place he said, that he had been both Accused and Committed, without any *Oath* or *Affidavit* made against him, for any *Crime* whatever; Which had been in the Case of no other Lord but himself, and he did believe of no other Man.

Secondly, That there was no particular *Treason* mention'd in the *Articles* against him, only the word *TRAITEROUSLY* had been applyed to things which were not *Treason*, if they had been true (as was then declared by Sir *William Jones* the King's Attorney) and he said, there were good store of Witnesses to prove, that when it could not be maintained by Argument in the *House of Commons*, that any of the Crimes mention'd against him were *Treason*; It was answered by one of the long *Robe* there, (who would not have spared to have assigned the *Treason*, had there been any) that however they ought to give the title of *High-Treason* to the Articles, for that otherwise they would dwindle to nothing when they came into the *House of Peers*. Now in the Impeachments of the other Lords (not to meddle with the Truth or Falstiy of their Accusers) they were Charg'd with the highest Treasons in Name, and upon Oaths made against them.

Thirdly, When a short day was set by the Lords for his being heard,
and

and that he appeared that day accordingly, his Council was then Threatned if they did dare to plead matter of Law for him: Which he said was never heard of before in any Man's Case whatever, nor in the worst of times.

Fourthly, He said if all the Articles had been true against him, and had been Treason; he had his Majesty's *Pardon* (which he then shewed to the Court, and demanded the benefit of it) saying, that that did pardon both his Crimes (if he were Guilty of any) and his Imprisonment, and yet, that both that *Pardon* and *he*, had been *Prisoners* together for above three years (of which he said he durst confidently affirm, that his was the first Precedent since the Conquest.

Fifthly, He set forth that he had not only his Majesty's *Pardon*, but that there had been his Majesty's *Declaration* of it in his *Speech* to his two Houses of *Parliament*, together with a *Declaration* of his Innocency, and a *Declaration* that he would give him his *Pardon* ten times over, if that were defective either in *matter* or *form*. And in this also he said that his Case was not only particular from any others, but that such *Declarations* of the King's Intentions to *Pardon* (although the *formal* Pardons have not been obtained) have heretofore been alone a ground to procure Bail at least, when the Party has been the King's *Prisoner* and at the King's Suit, which he supposed was not doubted in his Case.

Sixthly, He said that he had not only been thus Committed, and thus detained for above 40 Months, but he had been kept a Prisoner without any prosecution for the greatest part of that time; which is another sufficient ground by the Law for Bail: But instead of a restraint *Ad Custodiam*, he said he had undergone punishments greater than the Crimes alledged against him could have deserved, if they had been true; both by the length of his Imprisonment (which was agreed to be a sufficient Ground for Bail, both by the King's Council and the Prisoner's, in the Arguments on the Grand *Habeas Corpus* 3^o Car. as also in *Melvin's Case*, 1^o Car. and in *Sir Tho. Darnell's* and other Cases.

By the Inconvenience of his Accommodations in the Prison, for above two years and a half of the time.

By two most dangerous Sicknesses in the Prison. And

By the loss of divers of his Family since his being in Prison, who would some of them most certainly not have been in those places where they have been lost, had he been at liberty.

He said he was informed, that his Majesty had been again pleased to give his Directions to Mr. *Attorney*, to give his Consent a second time to his *Bail*, and he did beg leave to ask Mr. *Attorney* if it were so? Whereupon Mr. *Attorney* did stand up, and say, that he had his Majesty's Directions to give his Majesty's Consent again to his Lordship's being Bailed.

His Lordship did thereupon say, that this also was particular in his Case; and he did believe, there was scarce a Precedent in the World, of the King's Prisoner, and at the King's Suit, not being Bailed when there hath been the King's Consent to it; unless where the Prisoner hath not been able to find sufficient Security for his Appearance to abide his Trial. For that the two only Justifiable Grounds for the Continuance of Restraint by the Law are, either for keeping the Party from being able to doe any harm by his being at Liberty, (of which the King is the best Judge) or for securing the Party to abide the Judgement of the Law, (in which the Court ought to have good satisfaction) and so they might have sufficiently in his Case.

He said, that the Precedent would be no less strange and new against the King, than against himself, if they should not permit him to be bailed under such Circumstances: For he had heard, that the Law did admit of no *Absurdity*; Now he did desire to know, how any thing could in reason be more *absurd* on behalf of the King, than if the King's Prisoner and at the King's Suit, should be kept in Prison by any of the King's Courts, against the King's Will?

Or how said he can any thing be more dangerous to the Subject, or be a plainer *failure* of Justice (whatever may be pretended to the contrary) than to say, that there can be any such restraint of *English* liberty, as cannot obtain so much as Bail, but by the leave of the House of Lords? When that House can neither meet but when the King pleases, nor can never sit longer than he pleases: So that to say a Man shall be a close Prisoner (I mean by that a Prisoner without Bail, for Bail itself is Imprisonment in the Eye of the Law) till he shall be discharged by the House of Lords; is to say, that a man shall be a Prisoner during the King's pleasure; which was the Great Grievance complained of, when the *Petition of Right* was granted, and that was thought to have fully and for ever Redressed that Grievance.

But if after so many heats and disputes which our Ancestors have had with the Crown about their Liberties, this Doctrine should now be admitted for Law; We would seem to endeavour, (as much as in us lies) to bring it to this Conclusion, and be our own *Felo's De se*; That the King shall have a way found out by our selves, and without his seeking how he may Imprison any Man, or number of Men when he pleases in a Parliamentary way; and by Dissolving that Parliament, he may keep them as long as he pleases in a Prison without remedy: But that he shall neither have power to Relieve us himself by his own Authority, nor by his Courts of Justice. So as in short by this Doctrine; The King should only have power to hurt his Subjects as much and as long as he pleases, but should not be able to doe them any Right if he would; and then we shall have *Magna Charta* and the *Petition of Right* Revers'd, instead of receiving that benefit by them, which the Kings of England have been so Gracious as to give us, and all the Learned Writers upon those happy Laws of Liberty have told us we are secure under, at all times, and against all Accidents whatever. He

He then begg'd leave to observe to his Lordship what he found in my Lord Chief Justice *Coke's* Comments upon *Magna Charta*, who said, that the words *Nulli Vendemus, Nulli Negabimus, aut Differemus Justitiam vel Rectum*, are spoken in the Person of the King, who (in Judgment of Law) is always present, and repeating the said words in all his Courts of Justice.

And therefore (says he) every Subject in the Realm may at all times have remedy by the course of the Law, and may have Justice done Freely, fully, and Speedily, without delay, for that Delay is a Sort of Denial.

The said Lord *Coke* observes further, that those words of *Magna Charta* are fully Expounded by latter Statutes (*viz.*) 20 E. 3. &c. which do direct, that there shall be no delay nor hindrance of speedy Justice to any man, neither by any Seal, nor by any Order, nor any Writ whatsoever; neither from the King, nor from any other; nor by any other Cause.

Now whatever may be said out of other Considerations, he said no Man can deny, but that there is great delay of Justice (to say no worse of it) to any Man who (through no neglect of his own) can neither get Trial nor Bail in above three years, although his Crimes were never so great: And he said he durst be confident, that the Makers of *Magna Charta* did believe they had secured all English Men from ever being under the possibility of such a Danger; and that he made no question at all, but that by Law we are so.

He said, that the said Lord *Coke* does say in his Comment upon the 15th W. 1st (where he speaks of what things are Baileable, and what are not, and names Treason amongst the things not Baileable) that is (says he) such offences shall not be Replevied by the Sheriff, but all or any of these he saith may be Bailed in the King's-Bench.

And he said he had also some of the present Judges opinions to shew, in this point, which he desired to Reade out of a Copy of the Lords Journal, (*viz.*) 23d. Decem. 1678, the Question being put, whether the Lord Treasurer should withdraw, 'twas carried in the Negative; and on the 27th. of the said December, the Question being put, whether the Earl of Danby Lord High Treasurer (who stands Impeached by the House of Commons) should be Committed? It was Resolved in the Negative.

And it was the same day propos'd to the Judges, whether the Judges can Bail any Person in Case of Misprision of Treason, wherein the King's life is concern'd?

To which Sir William Scroggs (Lord Chief Justice of the King's-Bench) Sir Francis North (Lord Chief Justice of the Court of Common-Pleas) Justice Windham, Justice Jones, and other of the Judges then present, gave

gave severally their Opinions; that the Court of *King's-Bench* may take Bail for High-Treason of any kind, if they see cause.

He cited the Lord *Coke* also in his Comment on the 24th W. 2^o where he says, that it is a Rule in Law, *Quod Curia Regi non debet Descere Conquerentibus in Justitia Exhibenda*. And the reason of this is, that a failure of Justice may be prevented, which he frequently says, is *Abhorred by the Law*: So as it appears, that *The Law Abhors all failure of Justice*, and he said, that if such failure do appear in his Case, or any Man's else, no Order can license such Failure nor no Court can Justify the not giving Relief against it; and he said, he should either make such failure appear, or his Lordship (meaning the Lord Chief Justice) would be able to tell him where he might repair for Justice; which both *Magna Charta* and the *Petition of Right* are understood to have provided at all times for the Subjects Liberty: But if his Lordship could not inform him where he might appeal forthwith for his Liberty, in that Case he said, that for that reason alone (were there no other) he ought of right to be admitted to Bail by that Court, till he could be brought before such a *Judicature*, as had power to discharge him.

He observed also, that the Lord *Coke* (in a Chapter on the *King's-Bench*) did say, that that Court might Bail for any Offensee whatsoever, and that in the said Chapter it was particularly observed, that there had been such care taken by the Law to avoid failure of Justice (even in small matters, in comparison of Liberty) that he gives there an Example concerning a Clerk or Officer of that Court: For he takes notice of what things, and against whom, that Court hath power to hold *Plea by Bill*; And amongst those, he names against any Officer or Clerk of that Court, and gives the reason; because if they should be Sued in any other Court, they would have the Privilege of that Court, which might be the cause of a failure of Justice; and from this his Lordship said it did appear, that the Law intended, that there should be no failure of Justice by the privilege of any Court, how great soever it was; for that (as was said before) the Law did abhor all failure of Justice: And he said, if such care had been taken against a failure, in such small matters, and not in what concern our Liberties, all English men ought Justly to break out into the like Exclamations, as the same Lord *Coke* and many others did, in their Speeches in Parliament, and in their Pleadings, 3^o & 5^o Car. upon the Arguments of the Grand *Habeas Corpus* at that time where the Lord *Coke* breaks forth into this Expression; *Shall I have an Estate of Inheritance for life or for years in my Land? And shall I be Tenant at Will for my liberty? Shall I have property in my Goods by the Laws? And not liberty in my Person?* And thereupon he tells us, That *Perspicue vera non sunt probanda*: As taking from granted, that our liberties were not to be doubted where our properties were so secured: And the King (says he) had distributed his Judicial power to Courts, and to his Ministers of Justice; *Who are to see right done*.

And

And he said the Lord Cook gave the Reasons of those Laws which are against undue Imprisonments, and that one of those is, *for the indefiniteness of time*, which he says may be *perpetual during Life*, and that his words are, *That it is unreasonable to think, that a Man has a Remedy for his Horse or Cattle, (if detained) and none for his Body Indefinitely Imprisoned: For that a Prison without any prefixed time is a kind of Hell.*

And here his Lordship said, that he hoped the Court would either allow him Bail, or tell him a *prefixed time*, when he should be Tryed or Discharged: he did then also Quote the Case of the Duke of Suffolk, 28 H. 6. and the opinions of Prescot and Fortescue, (who were eminent Judges) who said, that he ought not to be Committed, (though for Treason) without Especial Cause of the Treason shewed, which had not been in his Case.

He further said, That many other Principal Gentlemen of that Parliament had spoke most *sensibly* on the same Subject of Liberty, and amongst the rest, Sir Robert Philips had said, To have our Liberties (which are the Souls of our Lives) taken from us, and to be pent up in Goals without Remedy by Law, and this to be so adjudged, (for so that Court had then thought fit to deny Bail, for Reasons which were at that time also best known to themselves) he cries out, *Oh improvident Ancestors! Oh unwise Fore-Fathers! to be so curious in providing for the quiet possession of our Lands, and to neglect our Persons and Bodies! And to let them lie in Prisons! And without Remedy, durante bene placito! If this be Law, what do we talk of our Liberties? This (says he) is Summa Totalis of all Miseries.*

He said also, That Mr. Selden did in the same Parliament argue at a Conference with the Lords, That in all Cases where any *Right or Liberty* belongs to the Subject, by any *Positive Law*, written or unwritten; if there were not also a Remedy by Law, for enjoying or regaining of this *Right of Liberty*, when it is violated, or taken from him; the *Positive Law* were most vain, and to no purpose; and it were to no purpose for any Man to have any Right in Land, Liberty, or other Inheritance, if there were not a *known Remedy*, by which in some Court of *ORDINARY JUSTICE* he might recover it; and in this Case of Right of Liberty of Person, if there were not a Remedy in the Law for regaining it, when it is restrain'd; it were to no purpose to speak of Laws.

Here he desired leave to shew his Lordship what Sir Nicholas Hide (when sitting as Lord Chief Justice in that Court) did say on this occasion, *viz.* That the Kings pleasure is, his Law should take place and be Executed; and for that do we sit here; and whether the Commitment be by the King, or others, This Court is the place where *the King doth sit in Person to do Right if Injury be done*, and if it appear that any Man hath Wrong done to him by his Imprisonment; We have Power to Deliver or Discharge him: And he further said, That the same Lord

Justice, *Doderidge, Jones, and Whitlock*, (Answering the Prisoners Court-cil at that time) did say, the Attorney General had told them, That the King had done it, and that they (the Judges) do ever trust him in great Matters; and here he took occasion to say, That he hoped that the Kings Consent to his Bail, and his Declaration of his Innocency, would be now as much trusted in this Court.

He Cited also the Arguments of Mr. *Calthorpe* for Sir *John Corbet* on the same occasion, who sayed, That admit the Commitment were law-ful, yet when a Man hath continued in Prison a reasonable time, he ought to be brought to Answer, and not to be continued still in Prison; for that it appears by the Books of our Laws, that Liberty is a thing so fa-vour'd by the Law, that the Law will not suffer the continuance of any Man in Prison, longer then of necessity it must.

He Cited also Mr. *Hackwell*, who said upon the same occasion, That the Law admits not the Power of Deteyning in Prison at pleasure, when the Imprisonment is *but Pro Custodia*, for a Man by long Imprisonment might otherways be Punished before his Offence; and he mention'd an Expression of his, That long Imprisonment was *vita peior morte*.

He mention'd, how the Commons at the end of the Parliament, 3 Car. did desire, That the Judges might declare themselves upon the mat-ter, why those Gentlemen had not been Bailed, when (*by the Judges Ar-guments*) it was possible they might have been kept Prisoners all their Days.

To which he said *Whitlock* Answered. First, Not so, but they did Remand them, that they might better advise of the matter, and that the Gentlemen if they had pleased might have had a new Writ of *Habeas Corpus* when they thought fit. And Secondly, That he had spent much time in this Court, and that in such great Cases he never knew any Man Bailed without the King first consulted in it, and the same he said, was then said by the rest of the Judges of that Court.

Hereupon he made two Remarques, First, That by this it did appear, that upon Consideration, That Court had alter'd their opinions in the Case of Bail, just contrary to what their first opinions had been positive in; and Secondly, That the consulting of the King was ever necessary in such Great Cases; and he said, he did believe, that there was not a Prese-dent, where the King had agreed to the Bail, that ever it had been denied.

He said, That those Men whom he had Quoted were Men of no or-dinary Understanding in the Laws, and as the Judges then did at last ac-knowledg their sense of them to be right, so he said, He hoped our Laws were neither changed nor diminish'd, in what related to the *SUBJECTS LIBERTIES*; and he hoped that no Order of one House, nor Ordinance of both Houses, nor King alone, nor King and either House alone, could alter them; and he rested assured, that a King and Parliament would never alter them to the prejudice of Liberty.

He

He proceeded, That if the Law were still the same it was heretofore, it was plain that that Law did both give a power to that Court to Bail for all Offences whatsoever, (and for Treason particularly) and did require, that *the Subject should at all times find remedy in it*, when his Liberty was Restrained, *BT ANI CAUSE WHATEVER.*

The chief Reasons he said, why such large Powers had been given to that Court, were principally *for avoiding all failure of Justice*, and to the end, First, That the King may both have a means of giving Right to his Subjects *at all times*, according to his Oath at his Coronation, and according to the intent of *Magna Charta*, and the *Petition of Right*: And Secondly, That there might be *a constant place* for the Subject to resort unto for *Remedy at all times*, whensoever he was oppress'd in his Liberty: And he hoped we were not now to learn a new Law, that the King could neither keep his Oath, nor maintain *Magna Charta*, nor the *Petition of Right*, without the Assistance of an *Extraordinary Court*; which he may both chuse, whether he will call, or when he will call it, and how long it shall sit; which (as he had said) would put all under the *King's absolute Will*.

He then said, He took for Granted, that there would be no dispute made in this matter, but that there was an *Order of the Lords* which was supposed to stand in the way: But he said, If his Lordship would give him leave, he would first say something to the Order it self, and then he hoped to shew his Lordship, that it stood not at all in the way as to his Request of Bail; and that it should neither be interfered with in the least, nor the Jurisdiction of the Lords, nor their Proceedings medled with in any kind by his being Bailed; but rather owned, and submitted to, by his being Bailed to the Parliament.

And first for the Order it self, He desired the Court to observe, that it was Dated the 19th of March, 1678. and worded as followeth, (*viz.*)

Die Mercurii, 19^{no} Martii, 1678.

“ **T**HE House this Day taking into Consideration
“ the Report made from the Lords Committee for
“ Priviledges, that in Pursuance of the Order of the 17th
“ Instant to them directed, for considering whether Peti-
“ tions of Appeal which were presented to this House *in*
“ *the last Parliament*, be still in force to be proceeded on;
“ and for considering of the State of Impeachments
“ brought up from the House of Commons *the last Par-*
“ *liament*; and all the Incidents relating thereunto; up-
“ on which the Lords Committees were of opinion, That
“ in all Cases of Appeals, and Writs of Error, they conti-
nue,

"nue, and are to be proceeded on in *Statu quo*, as they
 "stood at the Dissolution of *the last Parliament*, without
 "beginning *De novo*. And that the Dissolution of *the last*
 "*Parliament* doth not alter *the State of the Impeachments*
 "brought up by the Commons in *that Parliament*.

Now upon this Order he observed, That it related as well to Appeals and Writs of Error, as to Impeachments; and seemed to be more fully worded to them, than to Impeachments: The Words *STATU QUO*, and *without beginning DE NOVO* being annexed in the Order more particularly to the Appeals and Writs of Error; whereas all that was said as to the Impeachments, he observed to be, that the Dissolution of *THAT LAST PARLIAMENT* doth not alter *the State of Impeachments* brought up by the Commons in *THAT PARLIAMENT*, and are not words which (strictly taken) can bind after the Dissolution of any *other than that Parliament*.

But he said, if the Order should be Expounded otherways, yet that both the Law, and the Practice of the Inferiour Courts, were undoubtedly contrary, *In the Cases of Appeals and Writs of Error*. And he hoped no Court would take upon them to Expound the Order so, as if they were at liberty, to split the Order, and to Judge *which part of the same Order should be binding and which not*, for that that would be to meddle in a more Extraordinary manner with the proceedings of the Lords, than he had desired.

Now as to *Writs of Error*, he said, there were full Resolutions of the Judges in the Case, tho in times of Prorogations only, when a day is set for the Sitting of the Lords House, and he cited the Case of *Heydon* and *Godsalve*, in *Crooks Reports*; as also the Lord Ch. Just. *Hales*, who did not only grant Execution upon a Writ of Error (depending in Parliament) but did also Answer the Defendants Council (who would have pleaded the Lords Order in bar of the Execution) that he should always pay all due Respect to that Superiour Court of the Lords, but that he must act according to Law, and that he knew, that the Lords did not intend otherwise. And of this Lord Ch. Just. *Pemberton* himself, who he said had denied Restitution upon an Execution lately taken out, in a Case where a Writ of Error was and is still Depending in Parliament. And in *Cases of Appeals*, he said he was Inform'd, that the Court of Chancery did not take any notice of the Appeal being in Parliament after a Dissolution, but did notwithstanding proceed to Sequestration. And he said that there was a late Precedent in the Court of Exchequer, in the Case of one *Fountaine*, where an Appeal was brought from a Decree in the Exchequer, and Recognizance entred into by the said *Fountaine*, to abide the Order of the House of Lords, and after the Parliament was Dissolved, the Council of the said *Fountaine* did Insist on the said Order before the Barons, that the House being possess'd of Mr. *Fountaines* Cause, and Security having been given by him to abide the Order of the House, that no Proceedings ought to be had in the Exchequer

chequer upon the said Decree, until the matter on the Appeal was determined before the Lords. Notwithstanding which, and that Mr. *Fountaine* produced the Lords Order in Court, and produced the security allow'd, yet the now Barrons Declared and Ordered, that the Decree by them made should be proceeded on against the said *Fountaine* in the Court of *Exchequer*: And a proceeding hath been had accordingly.

By all which he Observed, That the Inferior Courts did proceed upon matters forbid as much by the *House of Lords*, in the matters of Appeals and Writs of Error, as it was upon Impeachments, and yet that the reason was plain why they did so, for that the Parliament might proceed again upon the same Appeals, and Writs of Errors, notwithstanding those proceedings in the Inferior Courts, in the interval of Parliaments; for that none of those Acts of the Inferior Courts, does so hinder the proceedings of the Superior, but that the Plaintiff in Parliament may revive the same matter there again, by *Scire Facias*, or by Re-summons, &c. But he said, It was never heard of, that the Lords themselves did proceed again *Ex Officio*, without the Petition of the Party to revive the Cause: And so he said in the Case of Impeachments, that the Lords would no more proceed *Ex Officio* upon that neither, unless they were called upon by the Prosecutors, and then *their Lordships proceedings upon the Impeachment would be no more hindered by the Bailing of him in the Inferior Court, then they were in the other Cases by the Executions and Sequestrations which are Granted in the intervals of Parliament*, which were for the prevention both of *DELAT* and of *FAILURE of JUSTICE*.

Besides he said, If this should not be done, how could it be known, whether the Prosecutors of an Impeachment from the House of Commons (who are never the same Men in a new Parliament,) will proceed any more upon a former Impeachment? For he said it had many times fallen out otherwise, and he Cited a late Case of the Lord *Merdant*, who was Impeach'd upon Articles in one Session, and having taken out a Pardon during the Prorogation, was never more called upon, nor never question'd upon the former Impeachment; although the very same Parliament sat again, which had Impeach'd him, and therefore he said, That the Case might more probably happen to fall out so, when a new Parliament should meet again, which would consist of new Men.

He said, It was likewise to be Observed, that although the Transcript of the Record in a Writ of Error might have Days of continuance, yet no *Supersedeas* is grantable; and he said, That if the Lords Order be no ground for a *Supersedeas* on a Writ of Error, why the lying of an Impeachment should be a ground for Confining a Man within Fower Walls all his Life, he was sure must be both less reasonable and less just, As Liberty was more valluable then Property, and without which, Property could be of no comfort.

In the next place he Observed, That if the Order should be continued literally to mean, that the Impeachments as well as the Appeals and Writs of Error (and the Incidents relating to all of them) should remain in the same State they were at the Dissolution of *THAT PARLIAMENT* mentioned in the said Order, his case thereupon he said would be quite different from any others, for that he was *not under any Commitment* at the *Dissolution of THAT PARLIAMENT*, nor at the time when *THAT ORDER* was made, but was *then at liberty* to be a sitting Member of that House, and *by a Vote of the House, had leave to continue so*, for that (as he had already Observed) the Date of the Order was the 19th of March, 1678. and the Warrant of his Commitment did appear by the return before the Court to be, the 16th of April following: Inasmuch that he desired the Court to take notice, that the strict Letter of the words *Statu Quo* in the Order (compared with the time when the said Order was made) would be an Argument to set him *in a State of Liberty as he then was*.

He then told the Court, That by what he had said, he hoped he had made appear, that the Order did not afford the least shadow for the hindering of his being Bailed; but that on the contrary, the Reasons were much stronger for the doing of that, (as it related not only to him, but to the *Liberty of the Subject in General*) then for the proceedings which the Inferior Courts do daily practice upon Appeals and Writs of Error, (*which are but for Property*) and are *comprised in the same Order*, and therefore he said, That he hoped he should at least find the same favor in a Case of Liberty, which is allow'd every day in Cases of lesser Moment.

He then said, (that although it did not concern his particular Case) Yet for the sake of *English Liberty it self*, he could not but say something further upon this point; for he could not but be of opinion, That if the Order had directly forbid Bail, which it was far from doing) and besides, the Lords own practice had shew'd their meaning to the contrary, by the Bailing of a Commonnor, whose Crimes were declared to be greater then his, and in which Case they made no *Non Obstante* to their Order, but take that to be still in the same force towards him, as towards any others who are in Custody) yet he said, In that Case, if such an Order should be found to be against *Magna Charta*, and the Fundamental Right of the Liberty of the Subject, (as any thing must be *which does Subject any Man to an INDEFINITE IMPRISONMENT* :) he conceived that of Right, that Court ought to free any Man from such a Slavery, (for he said, he could give it no better a name) and he then Cited an Argument of the Earl of *Shaftsburyes* upon that point, which that Lord argued in that Court upon an *Habeas Corpus*, when the Court agree'd they would have Bailed him, had it not been in a time of an *Adjournment* only of the Parliament; his words he said, were, *That this Court will and ought to Judge AN ACT OF PARLIAMENT VOIDE, if it be against MAGNA CHARTA, and more might it Judge of AN ORDER OF THE HOUSE OF LORDS, that is put in Execution*

Execution to deprive any Subject of his LIBERTY; and as he said, this could not be denyed to be Law, so he was confident the Earl of *Shaftsbury* was still of the same mind, and so must every Lord in *England* be, or (when they consider their own Cases) they would make their Liberties to be very precarious.

He proceeded to say, That the Earl of *Shaftsbury* being allow'd to be a knowing Man, both in the Laws, Orders and Constitutions of Parliaments; he would beg leave to Quote another part of the same Speech, (viz.) That Mr. Attorney, (which was then Sir William Jones) was pleas'd to Answer the Instance of one of his Lordships Council, That if a great Minister should be Committed, he hath the Cure of a Pardon, a Prorogation, or a Dissolution, but (says the Earl) If the Case should be put, why Forty Members, or a greater number, may not as well be taken without any Remedy of any of the King's Courts; his Lordship said, That Mr. Attorney could not very easily Answer; and if in this Case (says he) there can be no relief, no Man can foresee what may be hereafter: And in another place of the same speech, he says, He does not think it a kindness to the Lords to make them Absolute, and above the Law, for so it must be, if it be Adjudged, that they may Commit a Man to an INDEFINITE IMPRISONMENT.

He said, He took these Men whom he had named, for no small Authorities in this Age, and the Earl of *Shaftsbury*, he said, was a Man still as much for the maintaining of this Order as ever, but that his Lordship did shew himself at the same time to be for *English Liberty*, and he plainly shew'd his own Sence, both of this, and of all Orders whatever, which concern'd the Liberty of the Subject, and declared, that he took that Court to be the proper Judge of all such Orders.

He said, It thereby appeared, how sensible that Lord was, that such Cases might concern Forty as well as One, and Members of either House, as well as other Men, and without relief, if it should be admitted, that ORDINART COURTS could not relieve; and the Earl of *Darby* said, That there was no Answering of these Arguments of the Earl of *Shaftsbury*, unless it could be denyed, That the King can Impeach as well as the Commons, or that the King cannot Call and Dissolve Parliaments at his own Will and Pleasure: For if he may (as was not to be doubted) he said, He was sure every Man in England was in the same Danger, when the King pleas'd, and then he saw nothing whereby we had any Security, but that we lived under a King who would not Exercise this Power over us, which we will needs put into his hands, although he does not desire it himself: As if we were so weary of our Liberties, that we would be Industrious in contriving how we might insensibly slide into those Slaveries, which our Ancestors have been some Ages taking pains to secure us from, and our Kings have been so gracious as to Grant and Confirm to us, so many times over as they have done; and which other Kings may be as ready to reassume hereafter, as we are to give them away.

He

He concluded his observations upon that Speech of the Earl of *Shaftsbury*, with taking notice, that his Lordship had shew'd he was one of those Peers who would take it for no kindness to be made absolute, and above the Law, by such Orders of theirs being construed to extend to *INDEFINITE IMPRISONMENTS*.

He then repeated *Sir William Jones* his Declaration in that Court, *that either a Pardon, a Prorogation, or a Dissolution was a Cure against such Imprisonments*, and he observed thereupon, that if that Doctrine were true, *that any one of those was a Cure against such Imprisonment*; (and he could not doubt of it's being good Law) then certainly he ought to find relief from his Imprisonment, *who had every one of those Cures on his side*.

He then desired to put the Court in mind, how in the worst of times, Justice had taken place so far, as to lay aside the force of Orders made in Parliaments after the Dissolutions of those Parliaments which made them, although it was to the prejudice of the Interest of those Usurpers themselves.

He cited an Instance of one *Sir John Stowel*, who by the Articles of *Exciter* was to have been admitted to composition for his Estate, but yet contrary to those Articles, the Parliament did afterwards order his Estate to be sold. After the Dissolution of which Parliament, *Sir John Stowel* pleaded by his Council (*which were Serjeant Maynard and Mr. Latch*) that that Order was Dissolved by the Dissolution of that Parliament; and that therefore the Articles were again in Force; and that the Plea was admitted to be good, and *Sir John* restored to the benefit of the Articles upon that Plea, *even by Bradshaw himself*. But he said, he was sorry that he could neither have *Sir William Jones* to argue those points for him which he had used against my Lord *Shaftsbury*, nor *Serjeant Maynard* to make good the Invalidity of Parliamentary Orders after Dissolutions, but he said, that it was not his fault, and he doubted not but he was before more Just Judges than there was in those ill times, and that he hoped *that the Liberty of the Subject was not now more Precarious than it was in those days*.

He added, that if upon such Orders Men could not be Bayled in the Interval of Parliaments, they would become Grievances equal to the *Multiplications of Treasons* in former Days, which have some times been greedily made heretofore by Parliaments in Distemper'd Times, but the Commons had never been quiet till they could get their Bear chain'd up and their Laws reduced to the old standard of Treason again; But yet those things had been done by Acts, and not by Orders of Parliament.

He desired them likewise to remember, that it had been one of the chief grounds of the late War betwixt the King and his Parliament (in which so much blood had been shed) that an Ordinance of Parliament should not be held equal to an Act of Parliament, and yet those were Orders

ders of both Houses: And now said he, shall we be defending, that an Order of one House only, shall be Equivalent to a Law? and shall be in force against our greatest and most sacred Laws of Liberty, which have been so confirmed to us? This, said he, I am not able to understand the reason of, nor will any Man, who shall give himself the least leisure to think upon it.

He then said, He desired to ask any Man that then heard him, or any Commonor of *England*, who would but take time to consider this Case, (*which may be any Mans in England*,) whether they would be contented to invest the Lords with such an *Inherent* Power over their Liberties, which they can no more be exempted from then the Peers themselves?

And he said, That the Lords had already made it appear, that they would not have any such *Arbitrary Power* placed in them, for that they had refused to pass a *Favorite Act*, (*which was for their own Tryals*) only by reason of a Clause which was Incerted therein, *To have Enacted the Substance of this present Order into a Law.*

And he said, That the House of Commons desiring that such a Power might have been Enacted into a Law, (*though themselves would have been the first who would have repented such a Law*,) did sufficiently denote, *That the Commons did not think the Order would be binding in Law after their Dissolution*; for otherwise what need was there of a Law? if the Order was in force after Dissolution, *without a Law.*

Upon the whole he said, He thought the Distemper of that time had given more weight to the Order, then any thing else, and some of their Lordships on that Bench did know, both in what an heat it had been made, and how it had been since blown upon by the Lords themselves; who he was confident would no more endure to have it Construed in that Sence which now seems to be put upon it, (*of Subjecting Men to be under INDEFINITE IMPRISONMENT*,) then they will endure themselves to be every Day put in the Stocks.

As he had said thus much to the Order it self, so he said, He hoped to make appear, *That the Courts Bailing of him would not at all Intrench upon the Order, nor meddle with the Jurisdiction of the Lords, nor their Proceedings in any kind.*

For that he took it for granted, That what is done by that Court, and the Courts of *Chancery* and *Exchequer*, on Appeals and Writs of Error, was understood not to meddle at all with the Jurisdiction nor Proceedings of the Lords in those Cases, and *that this was just the same, all being alike Subject to the final Determination of the Lords, whenever they pleased to call the Appeal, Writ of Error, or Impeachment, before them,*

them, and without any prejudice to their Lordships Proceedings by any of those Acts done by that or the other Courts in the Interval of Parliaments.

Besides, he said, It had been usual to Bail in that Court to the Justice Seat in Eyre, and yet that that Court could not proceed further.

He Instanced also, That Courts allowing of the Pardons of Peers, (when pleaded there) and yet that they had no power to proceed to the Tryal of a Peer.

And so he said, There were divers other Instances of that Courts proceeding to such and such degrees of Exercising their power to avoid delays, &c, where the Court had no Jurisdiction to determine the matter.

Precedents he said were not to be expected, which were exactly fitted to his Case, because he durst be bold to say, there never was such a Case before, (when well considered in all its Circumstances,) nor he hoped never would be again: But he said, That therefore both the Kings Power and the Peoples Liberties would be the more concern'd in what Resolution should be given by the Court in this Case of his.

He said, There were Precedents of Discharging of Men Impeach'd in Parliament upon the Kings Writ to that Court, Commanding the Proceedings to cease, and they have been Discharg'd accordingly by that Court, without any other Reason given in the Writ, but because the King held the Parties to be Innocent and free from the Crimes Charg'd against them. As in the Cases of *Melton Arch-Bishop of York*, and *Gravesend Bishop of London*, 7 E. 3.

He mentioned also *Hugh Spencer*, and *Sir Thomas Barkley's* being Mainprized to Parliament, and yet that the latter was upon suspicion for the Murder of a King, (*viz.*) *Edward the Second*.

He said, Inferior Courts had Bailed to Parliament about the Popes Bull, &c. *Reg. Writs*, 274.

He said, A single Judg (*viz.*) *Sir Robert Atkins* had lately Bayled one for Treason, and another for Murder, and that he did himself hear his Justification of both allow'd (as to the Legal part) before the King and Council.

He said, That Kings had formerly abolish't Accusations of Treason, and Instanced a Case of *Talbot* against *Ormond*, in the time of *H. 6.*

And to shew how powerful the bare intention of Kings to Pardon had been heretofore, he Instanced the Case of a man Indicted of Felony, who (without any Council) shew'd forth a Charter of Pardon to the Court, which

which was discordant to the Indictment, and also to his name, and yet because the Court perceived that it was the King's Intention he should be pardoned, he was Remanded to get a better Pardon. 26 Aff. p. 46.

And he did thereupon say, That he hoped the Kings Intention of Pardon as to him, had been sufficiently declared to the whole Kingdom.

And in short he said, that if the matter was proper for the Jurisdiction of that Court, before it was in Parliament; it's having been there, did not take away the Jurisdiction from a Competent Court, when the Extraordinary Jurisdiction fails; which was not to be supposed could lay all other Jurisdictions asleep, when itself was not in being; and especially when that Competent Court should do nothing in Contradiction to the Proceedings of the Extraordinary Court, as he hoped he had made appear, that that Court would not do by the Bayling of him.

Whereas on the contrary, he said it was most evident, that *Justice did fail in the highest concern (which is that of Mens Liberties)* unless he could be inform'd when and where he might certainly be either Tryed or discharged, for that (as he had said before) it was agreed both by the Council for the King, and the Council for the Prisoners, in the Arguments on the Grand Habeas Corpus; that *INDEFINITE IMPRISONMENT* was held to be *PERPETUAL IMPRISONMENT* which the Law did admit in no Case where the Imprisonment was only *AD CUSTODIAM*. And although his had been intended but *AD CUSTODIAM*, yet it could not be denyed, but it had already been *ad Gravem pœnam*, and without any peticular Cause yet shew'd for which he ought not to be Bayled by Law.

He then said, that Littleton had declared in his Arguments 5 Car. That if Treason in General should be held to be a sufficient Return, yet that the Kings-Bench might Bayle: And the said Littleton and the Kings Attorney in their Arguments (one for the King, and the other for Mr. Selden) did agree, that where the Party could not avoid the Judgment of the Law, nor that there was no Danger by his being at liberty, He ought to be Bayled after long Imprisonment, and at that time, six Months was taken to be long Imprisonment.

He said he had read a passage in the Lord Cokes Institutes, where he spoke of such Imprisonments as he compared to the Imprisonment of St. Paul by the Centurion, who first put him in Chains, and then enquired who he was and what he had done.

He said he would not compare his case to that; but that there was so much of resemblance in it, that he had been in Chains (or what was there meant by Chains (which was a Prison) for above three years, on a pretence of Treason, without being told to that day what kind of Treason

Treason he had committed ; which had been done in no bodies Case but his, and by so much the greater was his hardship.

He had also both been Accused and Committed without any Oath made against him.

When a Day had been appointed for his hearing, his Council had been forbid to Plead matter of Law for him.

It had been acknowledged that there was no Treason contained in any of the Articles against him, if they were all true.

And if they had been true, and had amounted to Treason, he had there shewed the Kings Pardon, which did release both the Crimes and the Imprisonment.

That besides that Pardon, he had had his Majesties Declaration in full Parliament, both of his Innocence, and that he would Grant him his Pardon ten times over if this were defective.

That he had now had his Majesties Consent to his Bayle, a second time, Declared to that Court by the Attorney General, by the Kings Direction.

That in all these foregoing Particulars, his Case was singular, and different from all others, who are or have been made Prisoners since the beginning of the late Plot, or (as he believed) at any other time.

Besides these things which are peculiar to his own Case, he said that these was also what was Common to other Cases as well as his.

The length of his Imprisonment, which had been above 40 Months.

The being Confin'd so long under pretence (as he conceived) of an Order of the House of Lords *which neither Directs nor Implies any thing to forbid Bayl.* But in that also he had what was particular to himself (which he had already said, and desired leave to repeat, because it would deserve their Consideration) *viz. That he was at liberty, and had leave to be a sitting Member in the House of Lords at the time when that Order did declare that the Impeachments, Appeals, &c. and the Incidents belonging to them should stand in STATU QUO, so that (as it already observed) the STATUS QUO (as to him) he again said was to put him into a State of Liberty.*

Lastly he said, that he had no prospect now when any Parliament would sit, and by the examples of past Parliaments he might reasonably fear, whether when they did meet, they might sit so long as to give him Relief ; for that his Petition had been Read the first Day that the last Parliament entered upon any publick business, or whether greater business of the Kingdome might not (as it had done already)

so take up their time, as not to give them leisure to consider the Case of a single Person: And since this had already fallen out to be his misfortune in Three Parliaments successively, he took it to be but too plain a *Demonstration of his lying under an Indefinite Imprisonment*, unless he should find relief in that Court, for that there was no other to Appeal unto.

He said, That in those Great and Eminent Cases which fell out 3 & 5 Car. about the Bayling of Persons Committed to *Indefinite Imprisonment*, the Judges were then very positive against their Bayl, and yet changed those Opinions afterwards; and so he hoped that Court might do upon a due consideration of his Case and Circumstances; or else he hoped that his Lordship would convince him, that his *Imprisonment was not Indefinite*, by letting him know at what prefixed time, and where he might resort for remedy, which the Law does without question allow to all men, and at all times.

He said he was a very reasonable man, and when he was convinced by reason (upon which he was sure all Laws were founded) he could be content to suffer still, though his Imprisonment had been so long already; for that however he may have been Misrepresented for an *Arbitrary Man*, he would rather perish in his Prison than have any thing done for him which the Law would not warrant: But on the other side, he should be sorry that his Case should be made a *Precedent against Law, and against English Liberty*, which he was sure it would be, if he should be continued to ly under an *Indefinite Imprisonment without being bailed*; and he said he was not ashamed to say, in the behalf of all *English mens Liberties*, as well as of his own Case; That it was a Case which did concern every man to take care of in the Consequences of it, and which did cry loudly for Relief.

He then told the Court, That he had troubled them long, but that he hoped it would be excused in a Case of that moment: And in the first place he said, he hoped it was plain, that That Court had it in their power to grant him Relief if they pleased.

That it was as plain, that there was nothing in the Lords Order against it, and that the practice of the Lords had been otherways, even in the behalf of Commoners.

That it was apparent, that both that Court, and the Courts of Chancery and Exchequer, do relieve upon Appeals and Writs of Error, which are in the same Order with the Impeachments, and yet do in no sort meddle with the Judicature or Proceedings of the House of Lords.

That it was manifest, that let the Order be construed as any man pleases, yet that Bailing could be no sort of Judging of any Proceedings in the Superiour Court, but would leave the Judgment intirely to the Parliament, and would continue him a Prisoner in Law,

bound to appear before that Extraordinary Court, whenever his Majesty should be pleased to call it; and he said it was more evident, that *otherwise* he was an *Indefinite Prisoner*, and at the *King's Will only for his Liberty*, the Consequences of which every man ought to lay to his heart with a dread of it, whenever they should live under a Prince that might not be so merciful as our present King, and he hoped the Court would duly consider it,

Besides all this he said, he durst confidently affirm, *That there was not a Precedent since the Conquest, of any man's being refused Bayl under such Circumstances as his were*: Whereas he said, the detaining of men under long Imprisonment, ought either to have *express Law* for it, or a *good number of Precedents*, and in good times to *justify it*, and not any single Instance or two (if they could be produced) which he thought they could not,

And he hoped that Precedent which he had already mentioned on his Majesties behalf, would be very well considered, which was; How the *King's Court* should keep the *King's Prisoner*, and at the *King's Sute*, in the *King's Prison*, with the *King's Pardon*, and against the *King's Will*, twice declared in that Court, by his Attorney General.

He said he should conclude with letting his Lordship know, that as the King himself had sufficiently declared, that there was no danger in the letting him have his liberty, so he had such Bayl to offer to his Lordship as would sufficiently satisfy the World, that he should be forthcoming to answer when and where that Court should appoint, and then he hoped the two chief grounds for detention in a Prison (*viz. The danger of a Mans having his liberty; and the danger of his not appearing to abide his Tryal*) would be fully answered.

And if it might not seem too great a vanity to say (although the true reason do's take away the vanity of it, because it would not be for his, but for their own sakes, as what may happen to be their own Cases) he said he doth believe, he could have the Major part of the House of Lords to be his Bayl in this Case, and some of those very Lords, who were for the making of this Order, although not in that sense which would seem to be put upon it. In so much that there would be no more to fear in the Granting him Bayl, than he hoped there was either Reason or Justice to deny it. And he doubted not, but he was there before very just Judges, who would duly consider what he had said.

The Lord Chief Justice then speaking did say, That the Earl of Danby had seemed to reflect upon the Court, as if they had denied him Justice in not hearing his Counsel.

Then the Earl of Danby desired leave to interrupt his Lordship, saying, That his Lordship had mistaken him, for that he had said no such

such thing of that Court, nor did he mean it of that Court; but said, it was very well known that his Counsel had been forbid to plead for him in another place, which was then acknowledged by Justice Jones to be very true.

The Lord Chief Justice then proceeded, and said, That for his Lordship's saying, they needed not to fear, because he did believe the Greatest part of the Lords would be his Bayl: That it was not the fear of another Court that had any kind of influence upon them, or that they should do such things as they feared to be called to an account for; but that they were to govern themselves by the doing of Justice.

That they had heard his Lordship with a great deal of patience, and that he had said many material things, and with much acuteness, and that they were not senseless of the hardship of his Lordships Case, and of the greatness of his sufferings.

That they were likewise sensible of the Kings desires that his Lordship should have no longer Imprisonment than the Law requires; and he confessed *that the King had done as much as lay in his power.*

That it was not denied, because that Court could not Bayl for Treason, *for that they had a power to Bayl in all Cases whatsoever*, if the Court saw cause: Neither would the Indictment which was found against him about Sir Edmond-Bury Godfrey have hindred; *nor was it the Order of the House of Lords which hindred them*; But that they were to act there according to Law, and he prayed his Lordship to consider that they could not relieve him according to Law.

That he did agree to some things mentioned by his Lordship, and that it was a very hard Case he should lye so long in Prison; but here was the misery; they could only compassionate him, for that his Lordship was imprisoned by an higher Hand, and where they had no power to intermeddle.

He instanced in Indictments for Treasons, and several other great Crimes, in which they could Bayl men, but in this Case, *the Supream Jurisdiction of the Nation had laid their hands upon it, which was attended by the House of Commons with an Impeachment.*

Whether their Lordships had cause, or not cause to commit his Lordship, they could not Inspect; But that they ought to believe that his Lordship was justly Committed, and that their Lordships in their mature Deliberation would do nothing unjustly.

He said, That they had a Jurisdiction over all the Courts in the Kingdom (that only excepted) *and as it would be very Incongruous for an Inferiour Court to Bayl whom they had Committed, or to call their Processés in question, so would it be in like manner for them to do*

do in this Case, because the Lords exceed their Jurisdiction, and were above them : He said also, That the Opinion of all the Judges in *England* had been taken therein, and had delivered their Opinions, that he could not be Bayled, and that the truth was, his Lordship was imprisoned by too high a Court for them to Bayl him : But that his Lordship was not Indefinitely Imprisoned as he had alledged; for whenever his Majesty is pleased to call a Parliament, his Lordship would have remedy.

That the King has power to do it when he pleases; and for his Peoples good, no doubt he will when he sees fit : But that at some time the Circumstances of State differ from other times, and that it may not for some space of time be thought convenient; and though this may prove mischeivous to a single Person, or to two or three Persons, yet such things must be endured for the good of the Publique. He said also, *That if that Court should commit a man for High Treason, and the King should Adjourn them from time to time, that man could not be Bailed untill they sat again* : So that he must confess (as his Lordship had said) that as this Case did happen, he was under a Temporary Indefinite Imprisonment.

He concluded which telling his Lordship, *That he must be contented to wait the Kings pleasure when he would call a Parliament.*

That for his part, he was before of Opinion that they could not Bayl his Lordship, and he was so still.

The Earl of *Danby* to all this answered, that he must confess his Ears did tingle to hear his Lordship say, *That the King had done as much as lay in his power*; when his Majesty is bound both by his Coronation Oath, and by the Laws, to see right done at all times to his Subjects, and he desired to know whether this was not the Kings Court, and whether he had not deputed a Power to them to see right done to, all accordingly?

He said also, that he was now under greater amazement than before, since his Lordship had both granted, *That this Court could Bayl any Treason*, and that the Order of the House of Lords did not hinder it; which till now he confest he had taken to be the only obstruction to his Liberty.

That he had hoped he had satisfied his Lordship, that although he was Imprisoned by an higher hand, yet that the Bayling of him did not intermeddle with the Jurisdiction of that higher Judicature, and he had yet heard nothing to shew him that it did.

That for what his Lordship had said of the Opinion of all the Judges in *England*, being taken in his Case, he must needs inform his Lordship, that That was a mistake; for that the Opinion of the Judges had never been asked in his particular Case, saving once, upon his Petition-
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ing the King for Liberty to go to his Countrey House at *Wimbledon*, with a Guard; or otherwise, as his Majesty should think fit; which Petition was referred by his Majesty to the Judges; and they (according to their wanted prudence and caution) did only Report that they thought his Majesty could not Legally grant the Petitioners request.

That whereas his Lordship said, That he was not *Indefinitely Imprisoned*, for that whenever his Majesty is pleased to call a *Parliament*, he will have remedy; and that he must be content to await the King's pleasure when he will call a *Parliament*; He took those to be fuller Arguments than any himself had made, to prove that his Imprisonment was *Indefinite*; and at the Kings pleasure, so that he was now more fully confirm'd than ever to be of that Opinion, and wist that every man that heard that Doctrine given for Law, might fully consider the consequences of it.

He said further, that his Lordship had mistaken him in thinking that he had said he was under a *Temporary Indefinite Imprisonment*, for that he had said he was under an *absolute indefinite Imprisonment*; and that his Lordship had rather proved him to be so, than shewed any thing to the contrary; nor did he know what *Temporary Indefinite* did mean.

The Lord Chief Justice then said, That he was not a Judge at that time when the Judges Opinions were asked, but desired his Br. Jones to relate how it was.

Mr. Justice Jones then said, That he remembered the Case had been put to the Judges, Whether the Lords in the *Tower* might be Bayled, and that it was then the Opinion of the Judges that they might not; but he said he did think the Earl of *Danby* was not particularly concerned in the question at that time, but that it related to the *Popish Lords* only, and that there was much difference betwixt his Lordships Case and theirs, Besides he did think that was at a time when there was a day appointed for the meeting of a *Parliament*.

The Earl of *Danby* then said, that the question which was put at that time to the Judges about the *Popish Lords*, did not concern his case at all, for that it differed from theirs in very many particulars, which he had already mentioned, *viz.* Of no Oath against him, No special Treason alledged, &c. which he was loth to trouble them with Repeating again; but he supposed that the then Opinion of the Judges, ought not to be made any Argument against him.

He said also, that the Lord Chief Justice had argued very strongly for him; For that it was true, That the King might call a *Parliament* when he pleased, but if therefore a Man must stay in Prison till the King did please to do so, he may (by that very Argument) be there all his life-time if the King pleases; which confirm's what he

had been a great part of this time, labouring to prove; and he said, he must confess he did expect to have heard stronger and more powerful Arguments to have convinc'd him that he was in the wrong in what he had said; but that now he was more encourag'd than before, not to give over a Cause which did so much concern every Man in *England*.

The Lord Chief Justice then said, that his Lordship was mistaken in believing that That Court did keep him in Prison, for that he was not kept in Prison by them, but by a superiour Court, which was too big for them to meddle with, or to examine what they did.

To this his Lordship answered, That he had wrong done him, which must be done by some body, and that it was a Maxim of the Law, *That the King could do no man wrong* (being advised by his Courts) besides, that his Majesty had twice shew'd his Consent in that Court to have him Bayl'd. Neither could he say, that the Lords did him wrong, because there was nothing in their Order to hinder his being Bayled, (besides their own practice to the contrary) and it seemed now to be said, that it was by the Law, and not by the Order, that he was kept a Prisoner. He said, he would not say that That Court did keep him a Prisoner, but by some body he was sure he was kept Prisoner, but perhaps it might be by the Stars, since he could not find who it was upon Earth that did it.

He concluded that if he were legally Imprison'd, yet by *Magna Charta* and the *Petition of Right* &c. It was impossible for an English Man to be without some ~~certtain~~ prospect of relief in a reasonable time, they being to have Justice done them by the Law at all times, and without delay; and that he was now in the Kings proper Court for Justice, wherefore as his Lordship had given his own opinion, so he did desire that every Judge would be pleas'd to deliver theirs severally.

Then Mr. Justice Jones said, that he was not ready to give any present Opinion, there having been so much, and some things so materially said by his Lordship; but that for his better satisfaction he did desire to ask his Lordship a question, in a point which did much stick with him, and would go a great way in guiding his Judgment; and he was confident that his Lordship was as able to give him an answer to it as any Man; which was this, His Lordship (he said) had been charg'd with Treason by an Impeachment, and had pleaded a Pardon to the Impeachment before the Lords; He said he took that Plea to be a *Tacite Confession of guilt in Law*, (though the Party were never so innocent) and then it had been a *Tacite pleading of Guilty*, in so much that he did believe, there could be no admittance of any Second Plea, and if so, he did confess he did not see how that Court could then have any thing to do with his Lordship in that Case; but it

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was what he had not yet well considered (though at present he took the Law to be so) and he did desire to hear what his Lordship did say to that?

His Lordship answered, that he gave him great thanks for letting him clear any Objections, and giving him liberty to answer them as well as he could. That this indeed was a question of Law, which he was but little vers't in, but that he was at present able to say, that he had read the Opinions of some great Men of the Law, to be otherwise; and instanced what the Lord Coke had said upon the Case of *Grauesend* Bishop of London 7. E. 3. who did get a Writ of Discharge to the *Kings Bench*, and did not take a Pardon, upon which he observed the said Lord Coke to have said. *That it may be thought that the taking of a Pardon would have implied a confession of the fault, and therefore went a new way; but that was a mistake, for that no Man that is wise and well advised will refuse God and the Kings Pardon, how often so ever he may have it; for there is no Man but offendeth God and the King almost every Day, and the Pardon is the safest and surest way.*

And though at present he said he was not provided of Precedents in the Case, yet he remembred there was a Case of a Coyner tried at *Durham* upon a Pardon, where the Pardon proved defective, and yet he was allow'd to plead over.

And he told him, that the same question had been moved in the House of Lords upon his own Case, where divers Lords had declared themselves, *that they hoped it should never pass for Law amongst them, that a Man should not have one Plea for his Life, and gave for reason that if a Pardon was pleaded, and not admitted to be good; then the Prisoner had depended upon what he thought had been a good Plea, but was adjudged by the Court not to be so, and then if he should not be admitted to plead over, it would be to insure a Mans Life, without giving him any Plea at all for it.* And he concluded, saying, he thought that this question was rather going into the Merits of his Cause, than to what he only demanded; which was but Bayl.

Mr. Justice *Dolben* then said he must acknowledge there was a vast difference betwixt his Lordships Case and the Case of the Popish Lords in the *Tower*, in many Material particulars, which his Lordship had mentioned, and he must confess that he thought it one of the hardest Cases in England: He said also, that he could not but differ from what his Br. *Jones* had said, as to the not having liberty to plead over, for that he was of Opinion his Lordship ought not to be debarred from having a second Plea, if the Pardon should be over-ruled, and if (I did not mistake him) he cited the instance of one *Hesleys* Case (or such a name) and he said that his Lordship had said so many things of great consequence, that he thought it did very well deserve further

ther consideration, but if he should be put to give any present answer, he must then say (as my Lord Chief Justice had done) that he thought they could not Bayl his Lordship, but he thought it might well deserve further consideration.

Mr. Justice *Raymond* then said, That his Lordships Case had so many weighty Circumstances in it, as ought to make it to be very well considered, before any Opinion could be delivered in it. That for what had been said by his Brother *Jones*, about the Pleading over or not, he thought that did not properly lye before them in that place, That his Lordship had said *some things*, to which he thought full answers might be given, but that he had also said *some things*, to which he thought it would not be so easy to answer. That for his part he thought it was a Case which might well deserve the consideration of more of the Judges, betwixt this and the next Term, and that he must acknowledge he must further consider it, before he would presume to give any Opinion at all upon it.

A Council at the Bar then moved, that a Rule of Court might be made to bring his Lordship thither again, the first day of the next Term.

The Lord Chief Justice seemed displeased with the forwardness of that Counsel, and the Earl of *Danby* Excused it, saying it was not moved by his desire or directions; but said, that was all one as to him, whether there were any Rule of Court or no, for that they were like to be troubled with him again, and that he should not easily give over a Cause, wherein he took the liberty of the Subject in General to be as deeply concern'd as himself, and wherein he had found so little to be said against him, that he did believe he should be as troublesome to them as ever Judge *Jenkins* had been heretofore in the defence of English Liberty.

The Lord Chief Justice then standing up said, My Lord, your Lordship must for the present be content to be remanded; and speaking to the Lieutenant of the *Tower's* Officer, told him, he must take back his Prisoner.

And then the Lord Chief Justice immediately left the Court.

FINIS.